

Assembly Bill No. 498

CHAPTER 272

An act to add Article 13 (commencing with Section 10475) to Chapter 2 of Part 2 of Division 2 of the Public Contract Code, relating to public contracts.

[Approved by Governor September 24, 2008. Filed with
Secretary of State September 24, 2008.]

LEGISLATIVE COUNSEL'S DIGEST

AB 498, Hernandez. Public contracts: state contract eligibility: business activities in Sudan.

Existing law authorizes contracting between state agencies and private contractors and sets forth requirements for the procurement of goods and services by state agencies and the various responsibilities of state agencies and the Department of General Services in implementing state contracting procedures and policies.

This bill would prohibit a scrutinized company, as defined, that is involved in specified activities in Sudan, from entering into a contract with a state agency for goods or services. The bill also would require a prospective bidder for those state contracts, that currently or within the previous 3 years has had business activities or other operations outside of the United States, to certify that the company is not a scrutinized company and would impose civil penalties, as specified, for a company that provides a false certification. The bill would allow the Director of General Services, under specified conditions, to permit a scrutinized company to enter into state contracts for goods and services.

The people of the State of California do enact as follows:

SECTION 1. Article 13 (commencing with Section 10475) is added to Chapter 2 of Part 2 of Division 2 of the Public Contract Code, to read:

Article 13. Darfur Contracting Act of 2008

10475. The Legislature hereby finds and declares all of the following:

(a) On September 21, 2004, in addressing the United Nations General Assembly, President George W. Bush affirmed the Secretary of State's finding and stated, "At this hour, the world is witnessing terrible suffering and horrible crimes in the Darfur region of Sudan, crimes my government has concluded are genocide."

(b) The federal government has imposed sanctions against the Government of Sudan since 1997. These sanctions are monitored through the United States Treasury Department's Office of Foreign Assets Control (OFAC).

(c) Since 1993, the United States Secretary of State has determined Sudan is a country whose government has repeatedly provided support for acts of international terrorism, thereby restricting United States assistance, defense exports and sales, and financial and other transactions with the Government of Sudan.

(d) On December 31, 2007, President George W. Bush signed the Sudan Accountability and Divestment Act (Public Law 110-174). The legislation passed the Senate and the House of Representatives unanimously. That act authorizes state and local governments to adopt policies to divest from, and prohibit, contracts with problematic companies operating in Sudan's oil, power, mineral, and military sectors. That act also prohibits the federal government from contracting with these companies.

(e) On September 25, 2006, Governor Arnold Schwarzenegger stated, "Divesting will show our defiance of a government that murders" when signing Assembly Bill 2941 into law enabling the nation's two largest pension funds to divest from investments in Sudan.

10476. As used in this article, the following definition applies:

"Scrutinized company" means a company in Sudan that is involved in power production activities, mineral extraction activities, oil-related activities, or the production of military equipment, but excludes a company that can demonstrate any of the following:

(a) Its business operations are conducted under contract directly and exclusively with the regional government of southern Sudan.

(b) Its business operations are conducted under a license from the Office of Foreign Assets Control, or are expressly exempted under federal law from the requirement to be conducted under such a license.

(c) Its business operations consist of providing goods or services to marginalized populations of Sudan.

(d) Its business operations exclusively consist of providing goods or services to an internationally recognized peacekeeping force or humanitarian organization.

(e) Its business operations consist of providing goods or services that are used only to promote health or education.

(f) Its business operations with the Government of Sudan will be voluntarily suspended for the entire duration of the contract for goods or services for which they have bid on, or submitted a proposal for, a contract with a state agency.

(g) It has adopted, publicized, and is implementing a formal plan to cease business operations within one year and to refrain from conducting any new business operations.

10477. (a) A scrutinized company is ineligible to, and shall not, bid on or submit a proposal for a contract with a state agency for goods or services.

(b) (1) Notwithstanding subdivision (a), the Director of General Services may permit a scrutinized company, on a case-by-case basis, to bid on or submit a proposal for a contract with a state agency for goods or services, if it is in the best interests of the state to permit the scrutinized company to bid on or submit a proposal for one or more contracts with a state agency for goods or services.

(2) In making this determination, the Director of General Services may utilize the following resources:

(A) Verification by an independent third party or nonprofit organization that a company is doing either of the following:

(i) Undertaking significant humanitarian efforts in conjunction with an international organization, the Government of Sudan, the regional government of southern Sudan, or a nonprofit organization to benefit one or more marginalized populations of Sudan. The party or organization providing the verification or an independent third party must evaluate and certify that the significant humanitarian efforts are substantial in relation to the company's Sudan business operations.

(ii) Through engagement with the Government of Sudan, materially improving conditions for the genocidally victimized population in Darfur.

(B) Consideration of a National Interest Waiver issued by the President of the United States excluding a company from the federal contract prohibitions provisions of the Sudan Accountability and Divestment Act (Public Law 110-174).

10478. (a) A state agency shall require a company that submits a bid or proposal with respect to a contract for goods or services, that currently or within the previous three years has had business activities or other operations outside of the United States, to certify that the company is not a scrutinized company.

(b) A state agency shall not require a company that submits a bid or proposal with respect to a contract for goods or services, and that currently or within the previous three years has had business activities or other operations outside of the United States, to certify that the company is not a scrutinized company, if the company has obtained permission to bid on or submit a proposal for a contract with a state agency for goods or services pursuant to subdivision (b) of Section 10477.

10479. (a) If the Department of General Services determines that a company has submitted a false certification under Section 10478, the company shall be subject to all of the following:

(1) The company is liable for a civil penalty in an amount that is equal to the greater of two hundred fifty thousand dollars (\$250,000) or twice the amount of the contract for which a bid or proposal was submitted.

(2) The state agency or the Department of General Services may terminate the contract with the company.

(3) The company is ineligible to, and shall not, bid on a state contract for a period of not less than three years from the date the state agency determines that the company submitted the false certification.

(b) The Department of General Services shall report to the Attorney General the name of the company that the Department of General Services determined had submitted a false certification under Section 10478, together with its information as to the false certification, and the Attorney General shall determine whether to bring a civil action against the company. The company shall pay all costs and fees the plaintiff incurred in a civil action, including costs incurred by the state agency and the Department of General Services for investigations that led to the finding of the false certification and all costs and fees incurred by the Attorney General.

10480. This act shall be repealed upon affirmative action of the Legislature. Provided, that in determining whether to repeal this act, by way of suggestion and guidance only and without binding or in any way inhibiting the discretion of future sessions of the Legislature, it is submitted that the occurrence of any of the following should be construed and deemed to be a basis for repealing this act:

(a) The Congress or President of the United States declares the Darfur genocide has been halted for at least 12 months.

(b) The United States revokes all sanctions imposed against the Government of Sudan.

(c) The President of the United States has certified to Congress that the Government of Sudan has honored its commitments to do all of the following:

(1) Abide by United Nations Security Council Resolution 1769 (2007).

(2) Cease attacks on civilians.

(3) Demobilize and demilitarize the Janjaweed and associated militias.

(4) Grant free and unfettered access for delivery of humanitarian assistance.

(5) Allow for the safe and voluntary return of refugees and internally displaced persons.

(d) The Congress or President of the United States, through legislation or executive order, declares the contract prohibition of the type provided for in this act interferes with the conduct of United States foreign policy.

(e) Such other circumstances as the Legislature determines to warrant the discontinuance of the provisions of this article.

10481. (a) If any one or more provision, section, subsection, sentence, clause, phrase, or word of this act or the application thereof to any person or circumstance is found to be invalid, illegal, unenforceable, or unconstitutional, the same is hereby declared to be severable and the balance of this act shall remain effective and functional notwithstanding such invalidity, illegality, unenforceability, or unconstitutionality.

(b) The Legislature hereby declares it would have passed this act, and each provision, section, subsection, sentence, clause, phrase or word thereof, irrespective of the fact that any one or more provision, section, subsection, sentence, clause, phrase, or word be declared invalid, illegal, unenforceable, or unconstitutional.